the initiative process by Article 48. C.A. App. 522. The proponents of the petition were later permitted (under an agreement reached in this case) to gather signatures for Initiative Petition No. 99-2, and obtained more than the required number. Ultimately, however, because the petition had not been certified, the joint session of the Legislature that convened in May 2000 declined to act on it. C.A. App. 500-502.

**The Anti-Aid Amendment**

The petitioners' proposed initiative measure would have amended the 18th Amendment to the Massachusetts Constitution – commonly called the Anti-Aid Amendment. C.A. App. 522. That provision states, in part, that:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both . . . . and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Mass. Const. Amend. art. 18, as amended by arts. 46 and 103. The Anti-aid Amendment also contains an explicit guarantee of

the free exercise of religion. Amend. art. 18, § 1 ("No law shall be passed prohibiting the free exercise of religion.").

The present day version of the Anti-Aid Amendment – barring use of public money "for the purpose of founding, maintaining or aiding" private institutions generally – was enacted in 1917 (as Amend. art. 46) and replaced the original Eighteenth Article of Amendment enacted in 1855. *See* M.G.L.A. Const. Amend. Art. 18, Historical Notes (West 1997).[2] The original Article 18 barred only public funding of religious schools, providing that "such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." *Id.*[3]

The proposal to broaden the original Anti-Aid Amendment to preclude aid to *any* institution (whether religious or not) that was not under public control was made to the 1917-1918 Constitutional Convention by Martin Lomasney of

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[2] The Anti-Aid Amendment was approved by the voters on November 6, 1917, by a margin of 61% to 39%. 1 *Debates in the Massachusetts Constitutional Convention, 1917-1918* at 230 (1919) (hereafter *Debates*).

[3] In 1974 amendment article 103 was adopted, altering section 2 of the Anti-Aid Amendment (Amend. art. 46, § 2) to permit the Commonwealth to make grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions. The 1974 amendment also eliminated from section 2 of the Anti-Aid Amendment the 1917 language prohibiting public aid to schools and other institutions "whether under public control or otherwise, wherein any denominational doctrine is inculcated," leaving in place the wholly neutral prohibition enacted in 1917 on aid to schools and private institutions that are not "publicly owned and under the exclusive control, order and supervision of public officers or public agents . . . ."

Boston, a prominent Catholic politician. C.A. App. 638-41. This position represented a compromise intended to place on equal footing both parochial schools (which were already ineligible for state funds) and the private "academies" often attended by Protestants (which had been receiving public funds). C.A. App. 638. One prominent historian has noted that this compromise was supported by "[a] wide majority of the [constitutional] convention, including all but nine of the ninety-four Catholic delegates." C.A. App. 641. *See* 1 *Debates* at 199 (remarks of Mr. Coleman, noting that Anti-Aid Amendment was supported by Mr. Curtis, "a rock-ribbed Republican . . . of the Protestant faith" and by Mr. Lomasney, "a red-hot Democrat" and "a devout Catholic"; "yet they are joining heart and hand in their advocacy of this measure, upon which one might suppose they never would be able to agree").

**Lower Court Proceedings**

**District Court**. This action was filed on March 3, 1998, challenging both the Anti-Aid Amendment (art. 46, § 2) and the religious-institutions and Anti-Aid exclusions in Article 48. C.A. App. 8, 27-45. On September 2, 1998, the district court ordered, with the consent of all parties, that, pending a final decision in the case, the Secretary of the Commonwealth release blank petition forms to permit the petitioners to collect signatures in support of their proposed initiative (despite the Attorney General's earlier refusal to certify it). C.A. App. 50. After they collected the requisite number of signatures, petitioners moved for a preliminary injunction on April 6, 2000, to require the Attorney General to certify their petition, despite its non-compliance with Article 48. C.A. App. 15. On May 5, 2000, the district court denied petitioners' motion for preliminary injunction. C.A. App. 17. On February 12, 2001, the court granted the respondents' motion to dismiss, for lack of standing, the petitioners' challenge to the Anti-Aid

Amendment. C.A. App. 18, 51-60.[4] On March 31, 2004, the court, ruling on cross-motions for summary judgment, entered judgment in favor of the respondents on petitioners' claims that the Anti-aid exclusion and the religious institutions exclusion violate the Free Speech, Free Exercise and Equal Protection Clauses. Pet. App. 25a–36a.

Rejecting the Free Speech claim, the court recognized that the "effect of the . . . initiative exclusions . . . is to preclude direct popular lawmaking as to certain subject areas[,]" but not to "[restrict] speech either in favor or against any initiative petition that is permitted." Pet. App. 28a. The court observed that, under the Massachusetts constitution, "the initiative procedure . . . is an exception to the general rule that lawmaking will be accomplished by the legislature[,]" and "found no reason to think that the federal Constitution requires . . . [that Massachusetts] permit the initiative to be used for all lawmaking purposes without restriction . . . ." Pet App. 30a (finding that "topical grants or prohibitions of lawmaking powers are usual and traditional"). As to petitioners' Equal Protection claim, the court held that neither the Anti-Aid or religious exclusions "classify" petitioners "by reference to their religious beliefs or practices," Pet. App. 32a, finding instead that petitioners' "group identity," if they have one, is most defined by reference to their shared interest in the educational

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[4] On appeal, petitioners did not challenge the dismissal of their challenge to the Anti-Aid Amendment. Pet App. 2a, n.2. Consequently, substantial sections of the petition to this Court, which purport to show that the Anti-Aid Amendment has been "selectively enforced" to permit public funding of various types of private (religious and non-religious) institutions, but not of private (religious and non-religious) schools, are both immaterial and, in any event, show no cognizable form of impermissible discrimination. See Pet. 6-10, 27-30.

opportunities offered by religious-sponsored schools. *Id.* The court also found that because the exclusions pertain only to the initiative ballot, they do not burden petitioners' "fundamental right to practice their chosen religion." Pet. App. 33a. Accordingly, the court applied rational basis review and found rational the judgment reached at the Massachusetts Constitutional Convention of 1918 that some questions are better resolved in a legislative process, which "permits extended debate and compromise," than in the initiative process, which "essentially puts a fixed proposition to the general electorate for a single up or down vote." Pet. App. 35a. Finally, the court rejected the petitioners' claim that the religious exclusion violates the Free Exercise Clause because "the exclusion bears on the plaintiffs' ability to invoke the initiative process, not on the exercise of religion." Pet. App. 35a, citing *Locke v Davey*, 540 U.S. 712 (2004).

**Court of Appeals** The First Circuit affirmed. With respect to petitioners' Free Speech claim, the court observed that the Anti-Aid and religious institutions exclusions operate within a "procedure for generating law" and "aim at preventing some harm independent of speech – in this case, the use of the initiative process for the passage of certain types of laws believed to be unsuited to that process . . . ." Pet. App. 4a. As such, the court held that the exclusions are "at most, subject to intermediate scrutiny," Pet. App. 5a, because their effect on speech (*i.e.* precluding use of the initiative process to "spur[] public debate" on certain issues) is purely incidental. Pet. App. 7a-9a. The court then concluded that the exclusions meet the intermediate scrutiny standard in *United States v O'Brien*, 391 U.S. 367, 377 (1968). In particular, the court held that Massachusetts has a substantial interest in "restricting the means" for enacting laws affecting "the balance between promoting free exercise and preventing state establishment of religion." Pet. 12a. The court also held that this interest is

"unrelated to the suppression of free expression," *id.*, where the "exclusions regulate which types of laws or amendments can be passed by initiative, without reference to who may speak or what message they may convey." Pet. 11a.

The First Circuit also held that petitioners failed to establish that the religious exclusion violates their rights under the Free Exercise Clause. Pet. App. 13a.[5] The court found that the exclusion does not "discriminate on the basis of religious belief or status" because it "applies equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof." Pet. App. 15a. The Court also concluded that the exclusion does not burden any religious act or practice, where petitioners cannot claim that seeking a state constitutional amendment "is an aspect of practicing their religion." Pet. App. 16a. Finally, the court rejected, as unfounded, petitioners' claim that the religious exclusion "was motivated by animus toward religion[,]" Pet. App. 16a,[6] and explained that such evidence was, in any event, immaterial because petitioners had not shown a "resulting infringement" on religious belief, status, acts or conduct. Pet. App. 17a.

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[5] Petitioners did not challenge the Anti-aid exclusion under the Free Exercise Clause. Pet. App. 13a., n. 3.

[6] The court noted that petitioners submitted evidence of animus toward Catholics in Massachusetts in 1855 (when an earlier version of the Anti-Aid Amendment was passed), but "fail[ed] to show that religious animus motivated passage of the Religious Exclusion in 1918[,] * * * given the wide margin by which [the exclusion] passed, and the significant Catholic representation at the [Constitutional Convention of 1917-1918]." Pet. App. 16a – 17a.

The First Circuit also rejected petitioner's Equal Protection claims against both exclusions, finding that neither employs a suspect classification: "On their face, the Exclusions simply carve out particular subject matters from the initiative process. They do not require different treatment of any class of people because of their religious beliefs. They do not give preference to any religion." Pet. App. 20a. The court distinguished the exclusions from those laws struck down in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969), which "evince[d] a clear, solely detrimental effect on a suspect class." Pet. 21a. The court found that it need not consider the petitioners' argument that the Anti-Aid exclusion has a disparate impact on religious individuals where petitioners had "not shown a discriminatory purpose" behind enactment of the exclusion in 1917. Pet. App. 22a-23a. Accordingly, the court reviewed the exclusions under a rational basis test, which the court found was satisfied because the State's "goal of preventing the establishment of religion is a legitimate one." Pet. App. 24a.

## REASONS FOR DENYING THE WRIT

### I. The Petitioners' Free Speech Claim Does Not Merit Review.

#### A. The Lower Courts Have Consistently Held That The Government Does Not Violate The Free Speech Clause When It Limits The Subjects That Can Be Addressed In Legislation Proposed By Citizen Initiative.

Because the petition fails to satisfy any of the traditional criteria for a grant of certiorari, review should be denied. With respect to their Free Speech claim, petitioners incorrectly assert that review is needed to resolve a "split" among the courts of appeal "over the level of scrutiny" applicable to subject matter restrictions in the initiative process. Pet. 13, 16-19. To the contrary, all three federal courts of appeal (and at least one state supreme court) that have addressed the issue have held that the government may limit the subjects that can be addressed in citizen initiatives without violating the First Amendment. Petitioners are wrong to suggest that review is warranted simply because these decisions emerged from somewhat different analyses, especially where all three circuits agree that the decisions of this Court upon which petitioners rely, *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), are not controlling.

1. There is no conflict among the lower courts with respect to the Free Speech issue in this case. As the First Circuit observed, petitioners "do not cite to any precedent for the proposition that, under the Free Speech Clause of the First Amendment, a state may not restrict the subjects that can be addressed through its initiative process." Pet. App. 9a-10a.

Two other federal courts of appeal, the D.C. and Tenth Circuits, have directly addressed the Free Speech issue in this case and both, like the First Circuit, rejected the constitutional claim. In *Marijuana Policy Project ("MPP") v. United States*, 304 F.3d 82 (D.C. Cir. 2002), the D.C. Board of Elections refused to certify a ballot initiative to allow the medical use of marijuana, citing the Barr Amendment, by which Congress denied the District of Columbia authority to "enact . . . any law" reducing penalties associated with possession, use or distribution of marijuana. *Id.* at 83-84.[7] The D.C. Circuit held that this restriction did not violate MPP's rights under the Free Speech Clause, holding that "although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.* at 85.[8] The court rejected the argument that the Barr Amendment proscribed "core political speech," explaining that "medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties." *Id.*

Similarly, in *Skrzypczak v. Kauger*, 92 F.3d 1050 (10th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997), the Tenth Circuit held that pre-submission review of the content of an initiative petition by the Oklahoma Supreme Court did not

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[7] With respect to the District of Columbia, Congress exercises "all police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Marijuana Policy Project*, 304 F.3d at 83, quoting *Palmore v. United States*, 411 U.S. 389, 397 (1973).

[8] The D.C. Circuit also found "no case . . . establishing that limits on legislative authority – as opposed to limits on legislative advocacy – violate the First Amendment." *Marijuana Policy Project*, 304 F.3d at 85. *Compare* Pet. App. 8a–10a (First Circuit finding no authority for same principle).

amount to prior restraint of the "core political speech" of a person who, although not one of the filers of the petition, nonetheless desired to have the initiative on the state ballot. *Id.* at 1052-53. The initiative proposed restrictions on abortion that the Oklahoma Supreme Court held would be unconstitutional and could not be on the ballot. *Id.* at 1052. When the state court's action was later challenged in federal court, the Tenth Circuit held that the plaintiff suffered no harm cognizable under the Free Speech Clause, finding that she had no "right to have a particular proposition on the ballot" and explaining that the state "had done nothing to restrict speech: neither Skrzypczak nor anyone else has been silenced by pre-submission content review." *Id.* at 1053.[9] *See also Save Palisade Fruitlands v. Todd*, 279 F.3d 1204, 1211 (10th Cir.), *cert. denied*, 537 U.S. 814 (2002) (First Amendment does not require that initiative process "be granted to all political subdivisions or with respect to all subjects").

That three circuits have reached consistent results by somewhat different reasoning does not suggest that review in this Court is warranted. As explained above, the D.C. Circuit and the Tenth Circuit have held that laws or procedures that restrict the permissible subjects of citizen initiatives do not implicate Free Speech concerns at all. In the present case, the First Circuit "agree[d] with the D.C. Circuit that this type of regulation of a state initiative process is not aimed at regulating speech[,]" Pet. App. 11a, but viewed the Article 48 exclusions as having an "incidental" and "unintended" effect on speech

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[9] After considering the constitutionality of the proposed initiative, the Oklahoma Supreme Court had similarly rejected the claim that pre-submission review of the constitutionality of initiative petitions violated the proponents' free speech rights. *In re Initiative Petition No. 349*, 838 P.2d 1, 9-10 (Okla. 1992), *cert. denied*, 506 U.S. 1071 (1993).

that justified subjecting them "at most . . . to intermediate scrutiny." Pet. App. 5a. All three circuits found no positive authority for petitioners' basic proposition – that a "state must provide an opportunity for its residents to propose constitutional amendments or laws on all subjects by means of an initiative process." Pet. App. 8a. *See Marijuana Policy Project*, 304 F.3d at 85; *Skrzypczak*, 92 F.3d at 1053.

2. Significantly, the First, Tenth and D.C. Circuits all concluded that *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), did not address, and therefore do not control, the issue here – whether the First Amendment precludes limitations on the subjects that the initiative lawmaking process, itself, may address. In *Meyer* the Court struck down Colorado's prohibition on using paid circulators to collect petition signatures, finding it unduly restrictive of petition proponents' right to engage in political speech. 486 U.S. at 420-28. For similar reasons, *Buckley* later struck down Colorado's requirements that initiative petition circulators be registered voters, that they wear identification badges, and that petition proponents report the names, addresses, and amounts paid to petition circulators. 525 U.S. at 197-204. As the First Circuit observed, the Article 48 exclusions regulate "the *act* of creating law," and so are distinct from "[l]aws such as those considered in *Meyer* and its progeny [which] were aimed at directly regulating the *means* that initiative proponents could use to reach their audience of potential petition signers." Pet. App. 8a.[10] By similar reasoning, the D.C. and Tenth Circuits found *Meyer* and *Buckley* inapposite. *See Marijuana Policy Project*, 304 F.3d at 86 (because *Meyer* and *Buckley* deal with

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[10] *See Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003) (holding invalid statute requiring that signatures on petitions seeking to register a new political party be notarized by an attorney).

restrictions on petition circulators they "cast no light on the issue before us – whether a legislature can withdraw a subject from the initiative process altogether"); *Skrzypczak*, 92 F.3d at 1053 ("There is nothing in *Meyer* suggesting that there is a protected right to have a particular initiative on the ballot.").[11]

As explained above, the appellate courts have consistently rejected the Free Speech claim that petitioners advance and, in doing so, have relied largely upon the same general principles. Moreover, the courts of appeal uniformly, and correctly, reject that *Meyer* or *Buckley* mandate strict judicial scrutiny of provisions restricting the subjects that may be addressed in an initiative process. As such, petitioners do not demonstrate, as they must, a compelling reason for review in this Court.

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[11] At least two other circuits have similarly viewed *Meyer* and *Buckley* as inapplicable to state laws that set requirements for measures proposed by initiative (or subjected to referendum). *See Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir.), *cert. denied*, 528 U.S. 870 (1999) (claim of violation of First Amendment right to petition government did "not fall within the orbit of *Meyer* and *Buckley*" because "plaintiffs do not challenge a restriction on their exercise of the referendum right . . . . Instead, plaintiffs seek to expand the scope of the referendum right itself."); *Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997) (*Meyer* "established an explicit distinction between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process. The Court only addressed the constitutionality of the latter.")

### B. The Cases Petitioners Cite As In Conflict With the First Circuit's Decision Did Not Concern Subject Matter Limitations in a Citizen Initiative Process.

The decision below does not, as petitioners claim, conflict with decisions of the Eleventh Circuit, Sixth Circuit and the Maine Supreme Judicial Court. None of the cases that petitioners cite (Pet. 16-19) addressed the question that was considered by the First Circuit in this case – whether a state may limit the subjects that can be addressed in its citizen initiative lawmaking process.

Thus, in *Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996), the plaintiffs challenged, under the Petition Clause of the First Amendment, Florida procedures permitting judicial review of the "legal sufficiency" of a citizen initiative to occur shortly before the election, claiming the delay created uncertainly that deterred citizen participation. (The state court had ruled, one month before the election, that the title of Biddulph's petition was misleading and violated the rule that initiatives address only a single subject.) In *Biddulph*, the plaintiffs did not complain of subject matter limitations in the initiative process, but instead sought, without success, an order requiring *earlier* state court review of petitions or a process for revision of petitions that are held defective. In *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), the "issue on appeal [was] whether the circulation of [an initiative] petition, written only in English, in designated bilingual political subdivisions violated § 203(c) of the Federal Voting Rights Act." *Id.* at 1490. After holding that the "clear language" of the Act does not require bilingual initiative petitions, *id.* at 1495, the court, in *dicta*, added that a contrary requirement – that citizens translate their initiative petitions into Spanish – could implicate First Amendment rights under *Meyer*. *Id.* at 1494-95.

Similarly, the cases petitioners cite from the Sixth Circuit and the Maine Supreme Judicial Court also did not address subject matter restrictions in an initiative process. In *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993), the court reviewed a challenge under the First Amendment to a state board's refusal to certify a proposed initiative after the board disqualified many petition signatures for failing to meet state requirements (*e.g.* the signer was not a registered voter or did not provide a complete home address). *Id.* at 293, 296-97. In *Wyman v. Secretary of State*, 625 A.2d 307 (Me. 1993), the Maine Supreme Judicial Court held that the Maine Secretary of State violated the First Amendment in refusing to provide initiative petition forms to the plaintiff where, in the Secretary's opinion, the initiative would be unconstitutional if enacted. *Id.* at 309. The court noted that Maine law expressly required the Secretary to furnish such forms upon request, *id.* at 310, quoting 21-A M.R.S.A. § 901 (Secretary "shall furnish" petitions forms "to enable [a] voter to invoke the initiative procedure), and, accordingly, found no state interest supporting "executive oversight of the content of the petition prior to its circulation for signature . . . ." The court expressly did not consider the scope of the Secretary's statutory authority to determine, *after* signatures are gathered, the "validity" of initiative petitions. *Id.* at 310, n.6. The present case involves no claim that Massachusetts officials have closed the initiative process in violation of state law; rather, petitioners facially challenge limitations inherent in the scope of the initiative process as provided in the state constitution.

In sum, the cases cited by petitioners from the Eleventh and Sixth Circuits and the Maine Supreme Judicial Court did not involve subject matter restrictions on citizen initiatives; these cases addressed an assortment of other claims (only some of which arose under the First Amendment) concerning other aspects of particular States' initiative processes. Thus, it is

immaterial that the courts in these cases applied various levels of constitutional scrutiny to circumstances different from those here. Because these cases do not demonstrate a conflict at all, much less one that could be settled by a review of the present case, the Court should deny the petition.

## II. The Petitioners' Equal Protection Claim Does Not Merit Review.

### A. The Petition Does Not Identify an Important or Recurring Equal Protection Issue as to Which the Lower Courts Are in Conflict.

The petition also fails to satisfy the criteria for a grant of certiorari with respect to petitioners' Equal Protection challenge to the Article 48 exclusions. On this claim, petitioners do not argue that a decision by this Court will settle a conflict in the lower courts or that the case presents a significant and recurring question arising in any jurisdiction other than Massachusetts. Indeed, petitioners do not cite to any subject matter exclusions in the initiative processes of other States that are similar to the Anti-aid or religious institutions exclusions, and would therefore be affected by a decision of this Court on petitioner's Equal Protection claim.[12] On this basis, alone, review should be denied.

The arguments that petitioners do make also weigh strongly against review by this Court. Apparently conceding

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[12] Thus, although petitioners' second question presented implies that a recurring issue is raised (by referring in the plural to "state constitutional provisions" that exclude initiatives relating to religion or to funding religious schools), the petition nowhere cites to provisions in other jurisdictions comparable to the Massachusetts exclusions, much less provisions that have been called into question.

that the Article 48 exclusions are facially neutral, petitioners urge that review should be granted to "correct" the First Circuit's analysis of whether the exclusions are neutral *in their operation*. Pet. 19–22. In this regard, petitioners mainly argue that the First Circuit misapplied – to the particular facts of this case – the Court's well-settled precedent governing "political restructuring" claims, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). Petitioners also assert that the First Circuit should have given more weight to their view as to the allegedly disparate impact of the exclusions and the motivation of the Massachusetts Constitutional Convention of 1917-1918. Pet. 24-25, 28-30. These issues are, however, unique to this case and suggest no justification for a grant of certiorari. Because review of petitioners' Equal Protection claim would not resolve an issue of broad importance and because, as explained below, the court of appeals faithfully applied this Court's settled precedent to uphold the Article 48 exclusions, this Court should deny review.[13]

### B. The First Circuit Correctly Applied this Court's Precedents in Holding that the Article 48 Exclusions Do Not Violate the Equal Protection Clause.

The First Circuit correctly rejected petitioners' Equal Protection claims against the Anti-Aid exclusion and the religious-institutions exclusion because neither exclusion

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[13] Although petitioners refer to both the Equal Protection and Free Exercise Clauses in their second question presented, the petition does not challenge the First Circuit's conclusion that the religious exclusion does not violate the Free Exercise Clause. *See* Pet. App. 13a-17a. Petitioners did not challenge the Anti-aid exclusion in the First Circuit under the Free Exercise Clause.

discriminates based on a suspect classification or burdens a fundamental right. Accordingly, each exclusion need only be supported by a rational basis, which the court of appeals "had no difficulty" finding. Pet. App. 24a. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (in equal protection cases, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"). In addition, because the First Circuit also held that the religious-institutions exclusion does not violate the Free Exercise Clause, petitioners' separate claim against the exclusion under the Equal Protection Clause, also based on allegations of religious discrimination, is subject only to rational-basis scrutiny. *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), citing *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974).

Both of the challenged exclusions apply equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof. The Anti-Aid exclusion bars use of the initiative process to change any aspect of the Anti-Aid Amendment, whether related to religion or not, and thus does not classify based on religion. Similarly, the religious-institutions exclusion is neutral on its face and evenhandedly bars initiatives that would disfavor religion as well as those that might benefit religion. As the First Circuit concluded, the exclusions "simply carve out particular subject matters from the initiative process. They do not require different treatment of any class of people because of their religious beliefs." Pet. App. 20a.

Petitioners based their Equal Protection claim on *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). These cases, however, are easily distinguished because they involved laws specifically intended to impose a disadvantage on a particular

minority group by restructuring the political process *solely* to make it more difficult to enact laws to *protect or benefit* that group. In *Hunter*, the Court struck down a city charter amendment requiring that any city council ordinance dealing with housing discrimination based on race, religion, or ancestry be submitted to the voters for approval before becoming effective. 393 U.S. at 385. The Court found that, although the charter amendment "on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination . . . ." *Id.* at 391. Likewise, in *Washington*, this Court struck down a state initiative law that was intended solely to bar local school boards from busing students to achieve racial desegregation. 458 U.S. at 457. "[D]espite its facial neutrality there is little doubt the initiative was drawn for racial purposes . . . . . [T]he text of the initiative was carefully tailored to interfere only with desegregative busing." *Id.* at 471. Because "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority, and is designed for that purpose," *id.* at 472, "'the reality is that the law's impact falls on the minority.'" *Id.* at 475 (quoting *Hunter*, 393 U.S. at 391).

Unlike the laws in *Hunter* and *Washington*, the Massachusetts exclusions plainly do not "evince[] a clear, solely detrimental effect on a suspect class." Pet. App. 21a. The religious-institutions exclusion precludes initiative measures that would disadvantage religious institutions *and* those that would benefit such institutions; thus, it does not create a classification limited to religious persons. *Cf. Crawford v. Board of Education*, 458 U.S. 527, 538 (1982) (distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters"). As the First Circuit explained, the provision "does not exclude religious people, or people of a

certain religion, from proposing laws or amendments." Pet. App. 14a. Rather, it prevents "*anyone* from proposing new laws or constitutional amendments relating to religion through the initiative process." *Id.* (emphasis added). Accordingly, the exclusion does not "discriminate on the basis of religious belief or status." *Id.*[14]

Similarly, the Anti-aid exclusion evenhandedly places beyond the reach of the initiative each and every part of the Anti-Aid Amendment – including its explicit guarantee of free exercise of religion (amend. art. 18, § 1) and its prohibition on aid to private schools, hospitals and institutions that are *not* religious as well as those that are religious (*id.* § 2). Thus, the exclusion bars a broad range of initiatives, including those that would impair the free exercise of religion or permit state aid to non-religious private schools while forbidding such aid to religious schools. Indeed, petitioners acknowledge that the exclusion "erects a barrier" for *anyone* who seeks public funding for *private* schools – which are, of course, both religious and non-religious. Pet 28.[15] Thus, the petition fails to show that the Anti-aid exclusion discriminates on the basis of religion or any suspect classification. Pet. 27–30. *See James v. Valtierra*, 402 U.S. 137 (1971) (declining to extend rationale of *Hunter v Erickson* where referendum requirement

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[14] Moreover, as the First Circuit held in rejecting petitioners' Free Exercise claim, the religious exclusion does not burden or "prohibit any religious act or conduct." Pet. App. 15a. Petitioners do not challenge this conclusion in seeking review in this Court.

[15] *See* C.A. App. 699-700, 754-755 (respondents' affidavit documenting that 54% of Massachusetts private schools have a religious affiliation).

disadvantaged a group that sought public housing but did not implicate race or other suspect classifications).[16]

Finally, petitioners do not challenge the First Circuit's conclusion that the challenged exclusions "bear[] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. Pet. App. 24a. The provisions serve various legitimate governmental interests. For example, the religious-institutions exclusion precludes initiatives that, while perhaps politically popular, might treat particular religious institutions, or such institutions generally, in a manner that violates the state or federal Free Exercise Clauses or might violate anti-Establishment guarantees. The Anti-Aid exclusion protects the compromise embodied in the Anti-Amendment from being too easily overturned by direct popular action, which might open the public treasury to the demands of any variety of private

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[16] Even if petitioners had demonstrated that the exclusions, although neutral on their face, have a disproportionate negative impact on a suspect class, they would then have been required to prove that Massachusetts acted with discriminatory intent toward the class in enacting the exclusions. See Pet. App. 23a, citing *Hernandez v. New York*, 500 U.S. 352, 372-73 (1991). In this regard, petitioners seem to suggest that this Court should review the First Circuit's conclusion that petitioners failed to prove that the Massachusetts Constitutional Convention of 1917–1918 was motivated by religious animus when it passed the religious and Anti-aid exclusions. Pet. 24-25, 28-29. Review of this unique, fact-specific question would be particularly unwarranted. In any event, the First Circuit rightly concluded that the remarks petitioners submitted from a single delegate, *see* Petition 24-25, do not establish religious animus by Massachusetts Constitutional Convention, especially "given the significant Catholic representation at the Convention." Pet. App. 17a. *See* Pet. App. 23a (revision of Anti-aid Amendment in 1917 supported by 85 of 94 Catholic delegates and Anti-aid exclusion had "similarly broad support").

institutions (whether religious or not). This exclusion also protects from direct popular action the Anti-Aid Amendment's state constitutional guarantee of free exercise of religion. Both exclusions serve the general interest in reserving lawmaking on potentially difficult questions for careful consideration – and more flexible treatment – by the people's elected representatives.

There is no reason for review of this case, where the First Circuit carefully considered the full range of petitioners' equal protection claims, and particularly their arguments under *Hunter* and *Washington*, and correctly rejected them.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 05-519

In The
# Supreme Court of the United States

MICHAEL WIRZBURGER, ET AL.,

*Petitioners,*

v.

WILLIAM F. GALVIN, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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CONSTITUTIONAL PROVISIONS



OTHER PUBLICATIONS

## I. INTEREST OF THE *AMICUS*

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute for Justice has defended or is presently defending the constitutionality of programs in Arizona, Florida, Illinois, Ohio, and Wisconsin that give parents greater freedom to send their children to the schools of their choice. In addition, the Institute has spearheaded efforts to expand parental choice programs in Maine and Vermont that exclude religious schools from the choices parents can make. Now that this Court has ruled in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), that the Establishment Clause allows parents to freely and independently select religious schools in a religiously-neutral school choice program, the opponents of such programs are forced to rely on state constitutional provisions that have been or can be interpreted to forbid payment of state funds to religious schools.

Virtually all of these provisions were enacted to preserve a public school monopoly over the expenditure of public educational funds, at a time when the public schools were generically Protestant in orientation. Their intended purpose was to prevent any equivalent funding of the Catholic schools, schools that arose in response to the Protestant Establishment's efforts to use the public schools to proselytize Catholic children. As such, they represent a grossly hypocritical and discriminatory attempt to undercut and destroy Catholic schools. The Massachusetts constitutional provisions at issue in this case are prototypical of such provisions, and their history unmistakably reflects their origins in religious prejudice. Like similar provisions in other states' constitutions, they serve to stymie efforts to promote

greater school choice for families dissatisfied with their local public school systems.[1] Elimination of the pernicious effects of such provisions is a core goal of the Institute for Justice in pursuit of enhanced educational opportunity for all.

## II. INTRODUCTION

The ghosts of the Know Nothings are laughing. The nativist, viciously anti-Catholic political party secured one of its greatest political triumphs in the fall of 1854, when its candidates were overwhelmingly successful in taking over the state government of Massachusetts, winning the governorship and large majorities in both houses of the state legislature. The next year the Massachusetts Know Nothings began implementing their political platform, including restricting both the right to vote to those with twenty-one years of residence in this country and the right to hold office to native-born citizens, measures whose anti-immigrant animus is obvious. Less obvious on its face, but equally hostile to Massachusetts' substantial and growing immigrant Catholic minority, a constitutional amendment was successfully promoted by the Know Nothings that denied public funds for sectarian schools, reserving all

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[1] Were these provisions interpreted to apply solely to direct aid to religious schools as their language states, their current effect would not be an impediment to school choice programs passing muster under the Establishment Clause. But the Massachusetts Supreme Court, like those in some other states, has expansively interpreted these provisions to preclude aid to families that freely choose to use religious schools, such as by providing tax deductions for educational expenses. See *Opinion of the Justices*, 401 Mass. 1201 (1987). See also *Bloom v. School Comm. of Springfield*, 376 Mass. 35 (1978) (program loaning textbooks to private school students violates the anti-aid amendment). Thus the discrimination against religious schools is extended to include the families who would use them, an extension not required by the Establishment Clause.

funds for the ostensibly "nonsectarian" public schools, which were in fact generically Protestant institutions.[2] In this the sesquicentennial year of the enactment of the amendment, the Know Nothings would rejoice that the federal courts below have refused to even consider "the shameful pedigree" of this amendment,[3] let alone strike it down.

While the Know Nothings evaporated as a political party in the lead-up to the Civil War, the anti-Catholic animus that drove them allowed their legacy to live on. In Massachusetts, as elsewhere in the United States, recurrent spasms of anti-immigrant and anti-Catholic prejudice welled up in a cyclical fashion.[4] These outbursts often involved hostility towards the Catholic parochial schools that had developed in reaction to the thorough-going but "nondenominational" Protestantism of the public schools. In Massachusetts, which had enacted the first compulsory attendance law in the United States in 1852, repeated efforts were undertaken to destroy the parochial schools, including a two-year long battle in the Massachusetts legislature in 1888-89.[5] This battle took the form of a

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[2] See Lloyd P. Jorgenson, *The State and the Non-Public School: 1825-1925* (1987).

[3] As Justice Thomas observed in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000), "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for Catholic." The failed federal Blaine amendment of 1876 sought to replicate in the federal constitution the success the Know Nothings had achieved in several state constitutions in the 1850's, including in Massachusetts.

[4] John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (1955).

[5] Jorgenson, *supra* note 2, at 159-186.

"school inspection bill" that interpreted the compulsory education law to require students to attend either a public school or "approved" private school, approved by the public school authorities. Conditions for such approval made it clear that this was a stratagem to eliminate the Catholic schools. While this effort ultimately failed after a compromise solution was reached, anti-Catholic sentiment in Massachusetts continued, albeit at a lower pitch. Nativists in the Massachusetts legislature continued to be dissatisfied with the limited scope of the 1855 anti-aid provision,[6] and each year, beginning in 1900, proposed expanding it from schools only to forbid aid to any sort of "sectarian" (read "Catholic") institution.[7]

The First World War triggered yet another wave of anti-Catholic animus, which in Massachusetts coincided with a constitutional convention that commenced in 1917. This convention produced two amendments relevant to this case: one, an extension of the original 1855 proto-Blaine amendment prohibiting aid to private religious schools[8] to encompass a ban on state aid to *all* religious

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[6] For example, in 1849 the Massachusetts legislature had rejected a request for charter for a Jesuit college, Holy Cross College, in part because of fears that granting it would lead to requests for state funds, since such funds had been provided to many Protestant colleges. Jorgenson, *supra* n. 2, at 86-87. When Massachusetts finally granted a charter to Holy Cross in 1865, the law specified that "the granting of the charter should not be considered 'as any pledge of the Commonwealth that pecuniary aid shall hereinafter be granted to the college.'" *Id.* at 112 (*quoting* 1865 Mass. Acts ch. 99).

[7] I Debates of the Massachusetts Constitutional Convention 1917-18 at 182 (1918).

[8] While today the formulation "private religious schools" seems redundant, given that all religious schools must be private, it cannot be emphasized too often that by today's standards all public schools used to be "religious schools," and designedly so. This was true in Massachusetts,

(Continued on following page)

institutions, such as hospitals and orphanages, and two, an amendment that put the newly expanded prohibition off limits to the new initiative and referendum process allowing for greater citizen involvement in the passage of both legislation and constitutional amendments. Thus, the discrimination inherent in the 1855 amendment was compounded by both giving it a broader scope and making its removal more difficult. The District Court for Massachusetts and the First Circuit Court of Appeals have both failed in their duty to rectify this blatant discrimination against the Catholic religion and its adherents. This Court should grant the petition for certiorari to correct this longstanding and egregious religious discrimination.

## III. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THAT THE FIRST AMENDMENT DEMANDS THE HIGHEST DEGREE OF CONSTITUTIONAL SCRUTINY FOR LEGISLATIVE PROHIBITIONS ON SPEECH RELATED TO BALLOT INITIATIVES.

This case also presents this Court with the question of whether a state that has empowered its citizens to amend

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the birthplace of the Common School Movement, as elsewhere. These public schools were "nondenominational," which meant that while they did not teach doctrines specific to any Protestant sect, they did take a generic Protestant approach in their religious activities and textbooks. This approach led to resistance on the part of Catholics, who objected to the exclusive use of the King James Bible in the public schools, as well as to textbooks that openly disparaged Catholicism and Catholics. After losing most if not all of the battles over these issues in both state legislatures and the courts, the Catholic hierarchy determined to create, at enormous effort and expense, their separate parochial schools. Massachusetts' 1855 amendment served to preserve a monopoly on public funding for the Protestant "public" schools by denying equal treatment of the Catholic "private" schools. Jorgenson, *supra* n. 2.

the state Constitution directly, via ballot initiatives, may prevent the popular alteration of discriminatory constitutional status quos by creating content-based limitations on the power and forbidding the introduction of certain subjects for the approval of the state's voters.

The Constitution of the Commonwealth of Massachusetts permits citizens to amend that document when a sufficient percentage of the voting populace is persuaded that the ideas presented in a given ballot initiative are worthy of incorporation into the Constitution. Mass. Const. amend. art. XLVIII, pt. 1, definition. (Hereinafter "Initiative Amendment.") Another section of the Initiative Amendment, however, attempts to prevent certain popular challenges to the Constitutional status quo, prohibiting citizens from introducing ballot initiatives that would allow voters to decide for themselves how their government should best be ordered.[9] Mass. Const. amend. art. XLVIII, pt. 2, § 2. (Hereinafter, "Exclusions" or "Exclusionary Provisions.") As discussed above, the exclusions prohibiting amendment of the Constitution's religion-related provisions – including the Eighteenth Amendment's Anti-Aid requirement – were the product of anti-Catholic, anti-immigrant bigotry and intended to stave off popular efforts to gain equal treatment for religious

[9] In addition to forbidding amendments relating to religious matters and the state's anti-aid provision, section 2 of the Initiative Amendment prohibits citizens from adopting amendments that would affect the judiciary, permit local or special laws, appropriate state funds for a specific purpose, or which would conflict with any part of the declaration of rights. Section 2 also denies the power to modify any of the exclusions listed therein. We note that only the religious exclusions are at issue in the instant case, due to their peculiarly discriminatory intent and history. We express no opinion today about the various other exclusions provided for in the Initiative Amendment.

minorities. The content-based distinctions that Massachusetts created between these excluded subjects and any other subject on which a citizen might desire to effect legislative or constitutional change not only strikes directly at the ability of citizens to create an effective public discussion about the fundamental precepts by which the people will govern themselves, but also perpetuates a system designed to disadvantage religious groups that were in the minority at the time the Exclusions were adopted. Because these Exclusions prohibit purely political speech inextricably tied to the peoples' exercise of self-government, particularly as it is related to the attempted remediation of historically entrenched religious discrimination, the Commonwealth's blatant prohibition on this speech must satisfy this Court's highest scrutiny if it is to co-exist with the requirements of the First Amendment.[10]

The Commonwealth of Massachusetts has opened a purely democratic avenue through which its citizens may bypass the pitfalls, compromises, delays, and corruption that typify the traditional legislative process, permitting individuals to present their ideas for "political and social changes" directly to other voters to gain their approval or

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[10] While this Court's decision in *Romer v. Evans*, 517 U.S. 620, 634 (1996), was based strictly on Fourteenth Amendment considerations, it bears comment that this Court has previously recognized the necessity of heightened judicial scrutiny where a state constitutional provision creates a "disadvantage ... born of animosity toward the class of persons affected." This principle is no less valid where the disadvantage is imposed upon religious minorities. Importantly, this Court recognized in *Romer* that an amendment intended to stave off efforts to remedy historical discrimination may still be invalid under the Federal Constitution even if the amendment pretends to maintain absolute neutrality. *See id.* at 626 (rejecting the State's argument that the challenged amendment merely "puts gays and lesbians in the same position as all other persons").

disapproval. The Massachusetts Supreme Court in *Buckley v. Sec'y of the Commonwealth*, 371 Mass 195, 199 (1976), expounded upon the purpose of Article 48 as follows:

> There can be no doubt that it created a peoples' process. It was intended to provide both a check on legislative action and a means of circumventing an unresponsive General Court. It presented to the people the direct opportunity to enact statutes regardless of legislative opposition. It projected a means by which the people could move forward on measures desirable without the danger of their will being thwarted by legislative action.

This articulation of the Initiative Amendment's fundamental purpose emphatically demonstrates that speech related to citizens' efforts to bring about legislative change under this section's provisions is unquestionably and inalterably the purest form of political discourse.

This Court has made clear that the essential purpose of the First Amendment is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . [T]he right freely to engage in discussions concerning the need for that change is guarded by the first amendment." *Meyer v. Grant*, 486 U.S. 414, 421 (1988). In *Meyer*, the state of Colorado had granted its citizens the power of initiative, but the legislature then attempted to impose significant restrictions on the peoples' efforts to exercise that power.[11] A group of citizens attempting to persuade Colorado voters to pass an amendment to the state Constitution sued,

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[11] The statute at issue in *Meyer* made it a felony for supporters of a ballot measure to pay people to help gather the signatures necessary to get a proposal on the ballot. *See id.* at 417.